



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

ELC NO. 60 OF 2016

IN THE MATTER OF SECTIONS 7, 17, 38 OF THE LIMITATION OF ACTIONS ACT CAP.22

AND

IN THE MATTER OF ORDER 37 RULE 7 OF THE CIVIL PROCEDURE RULES, 2010

AND

IN THE MATTER OF SECTIONS 30 (F) AND 30(G) OF THE REGISTERED LAND ACT, CAP 300 (REPEALED)

AND

IN THE MATTER OF SECTION 38 (h) OF THE LAND REGSITRATION ACT 2012

AND

IN THE MATTER OF LAND PARCEL KNOWN AS NANDI/CHEPKUMIA/502

BETWEEN

SOLOMON TOO 1ST PLAINTIFF

AGGREY KIBISU LUBISIA 2ND PLAINTIFF

VERSUS

ZIPPORAH JEBICHI SERONEY 1ST DEFENDANT

KENYA DEPOSIT INSURANCE CORPORATION

AS THE LIQUIDATION OF POST BANK CREDIT LTD 2ND DEFENDANT

RULING

A lot of ink and paper has gone into the application dated 21.3.2016 which is simply said, an application for interlocutory injunction restraining the defendants jointly and severally from selling, transferring, alienating or evicting the plaintiffs from the land parcel known as Nandi/Chepkumia/502 pending the hearing and determination of the suit and costs of the application. The application is based on the grounds that the plaintiffs have established a prima facie case with a probability of success and that damages

cannot adequately compensate the plaintiff. Lastly that the balance of convenience tilts towards maintaining the status quo.

The application is supported by the affidavit of Aggrey Kibisu Lubisia who states that they are in occupation of the suit plot since 1983 and therefore their claim is based on adverse possession. They have identified the registered owner as Zipporah Jebichii Serorey and that the property is charged to Post Bank Credit Ltd for a sum of Kshs 800,000/=. The Plaintiff seeks to ament their rights of overriding interest in accordance with the provisions of Section 30(f) & 30(g) of the Registered Land Act repealed and Section 28(L) of the Land Registration Act 2012. The Plaintiffs further complained that the 2nd Defendant has no right to exercise any statutory power of sale as the charge was not properly executed as the date of verification of execution is missing and that the valid statutory notice was given by the 2nd Defendant. Moreover, that the judgment sought to be executed has expired.

The 1st Defendant states that she is the registered proprietor of the suit land having inherited it from her late husband Morice John Serorey who died on 6.12.1982. She knows the 1st Plaintiff as her son to her step brother in law but does not know Aggrey Kibisu Lubisia. She has been in occupation since she become the registered owner to date. She denies the allegation that the plaintiffs have been in open occupation of the land and therefore denies that the plaintiffs are in adverse possession. She admits that the property is charged to Post Bank Credit Ltd in liquidation.

Winsome J. Kossom filed a replying affidavit on behalf of the 2nd defendant and confirms that the 1st Defendant is the registered proprietor of the suit property. The 2nd Defendant is the liquidation of Post Bank Credit Ltd who are the chargees of the suit property. According to the 2nd Defendant, the 1st Defendant has defaulted and due process has been followed in realizing the security. The 2nd Defendant has attempted to exercise his statutory power of sale by attempting to auction the property but bids have been lower than the reserve price. The 2nd defendant filed suit No. 2685 of 1996 and obtained judgment in favour of the chargee on 5.3.1997 but attempts to execute the decree in the judgment was stopped by this court.

The gravamen of the Plaintiff's submission is that the plaintiff has established a prima facie case with a likelihood of success as the plaintiffs are in adverse possession and that they are have overriding interest in the property. They rely on the valuation report which indicates that the property is occupied by several people whom the valuer could not ascertain their identities. The Plaintiff further argues that the statutory power of sale is not being legally and properly executed by the 2nd Defendant. Moreover, that the execution of the judgment in 2685 of 1996 is time barred.

The 1st Defendant submits that the plaintiffs' have not laid any basis for their claim for adverse possession and therefore there is no evidence to go to the main suit. Moreover, that the suit land is charged and therefore the rights of the owner was subject to a charge which is still in existence and that the bank has not recovered its debt. The gist of the 1st Defendant submission is that the plaintiffs have not established that they entered the suit land in adversarial manner and have not demonstrated existence physical possession of the land and have not demonstrated an equivocal intention to dispossess the owner. They have not demonstrated that the occupation was open, uninterrupted, adverse to the title of the owner. On the issue of irreparable injuries which damages would not adequately compensate, the 1st defendant submits that the plaintiffs have not demonstrated that they will suffer damages that the defendants cannot compensate in terms of damages. On balance of convenience the 1st Defendant argues that the parcel of land is charged and therefore the registered owner had envisaged title.

The 2nd Defendant on his part submits that the plaintiffs have not demonstrated that they have a prima facie case with a likelihood of succeed as the plaintiffs were in occupation of the suit land as farmhands and licencees and to be on the land which was an agricultural land with a tea plantation containing about 45,500 mature tea bushes and that the same was occupied by workers of the 1st defendant. The Plaintiffs came into possession as farmhands and therefore cannot claim adverse possession. The 2nd Defendant

argues that the plaintiffs have not demonstrated to court as to how they entered the parcel of land. On irreparable injury, the 2nd Defendant submits that the loss of the plaintiff can be quantified with reasonable accuracy and monetary compensation awarded of whatever amount that the court deems right. On the balance of convenience, the 2nd Defendant argues that it tilts towards not granting the injunction as the debt has now outstripped the value of the property at the 2nd defendants expense.

I have considered the application, the affidavits on record, rival submissions and as is usual in such applications the applicant has to satisfy three principles for grant of temporary injunction.

1) whether the applicant has demonstrated a prima facie case with a probability of success.

2) Whether the applicant is likely to suffer irreparable harm that cannot be compensated with damages if injunction is not granted.

3) Where the balance of convenience tilts if the court is in doubt.

The existence of a prima facie case in favor of the plaintiff is necessary before a temporary injunction can be granted to him. **Prima Facie** case has been explained to mean that a serious question is to be tried in the suit and in the event of success, if the injunction be not granted the plaintiff would suffer irreparable injury. The burden is on the plaintiff to satisfy the court by leading evidence or otherwise that he has a **Prima Facie** case in his favor of him. A prima facie case does not mean a case proved to the hilt but a case which can be said to be established if the evidence which is led in support of the same were believed. The first question is, has the plaintiff established a prima facie case with a likelihood of success. The Plaintiffs' claim to be in possession of the entire parcel of land measuring 9.2 Ha and have been in occupation since 1983. It is not in dispute that the property is registered in the names of the 1st Defendant and charged to the Post Bank Credit Ltd in liquidation. According to the Plaintiffs, the registered owner found them in occupation of the land and never told them to vacate. The plaintiffs have annexed photos of their homesteads, cows, tea plantations, indicating that they are in possession of the suit land. I do find that the Plaintiffs have established a prima facie case with a likelihood of success.

Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages the existence of a prima facie case is not itself sufficient. The applicant should further show that **irreparable injury** will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury. On irreparable injury that cannot be adequately compensated with damages, I do find that the plaintiffs are likely to be evicted from the suit land if order of injunction is not granted and that the families are likely to miss shelter. Any amount of compensation that comes after eviction will not adequately address the suffering the plaintiffs might undergo if evicted and left on the road.

The court should issue an injunction where the **balance of convenience** is in favor of the plaintiff and not where the balance is in favor of the opposite party. The meaning of **balance of convenience** in favor of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favor of the plaintiffs, the inconvenience caused to the plaintiff would be greater than that which would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the **balance of inconvenience** and it is for the plaintiffs to show that the inconvenience caused to them would be greater than that which may be caused to the defendants. Should the inconvenience be equal, it is the plaintiffs who suffer. In other words, the plaintiffs have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than which is likely to arise from granting it. The balance of convenience tilts towards granting the temporary injunction as the plaintiffs will be more convenience if the order is not granted as they will be evicted with their families.

Ultimately, I do grant a temporary order of injunction against the defendants jointly and severally restraining them whether by themselves, their security and/or agents from selling, trespassing, alienating or evicting the plaintiffs from the land parcel known as Nandi/Chepkumia/502 pending hearing and determination of the suit but limited to a period of 12 months from today. Orders accordingly.

Dated and delivered at Eldoret on this 26th day of January, 2018.

A. OMBWAYO

JUDGE